STATE OF MICHIGAN

IN THE SUPREME COURT

DOUGLAS LATHAM,

Plaintiff-Appellee,

v

BARTON MALOW CO.,

Defendant-Appellant,

Supreme Courts Nos. 148928
148929

Court of Appeals Nos. 312141
313606

Oakland County Circuit
Court No. 04-059653-NO

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PLAINTIFF-APPELLEE'S SUPPLEMENTAL BRIEF PURSUANT TO SUPREME COURT ORDER OF OCTOBER 3, 2014

ORAL ARGUMENT REQUESTED

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STATEMENT OF QUESTION PRESENTED

I. WERE THERE A SIGNIFICANT NUMBER OF WORKERS EXPOSED TO THE HIGH DEGREE OF RISK IDENTIFIED BY THIS COURT IN LATHAM v BARTON MALOW CO, 480 MICH 105, 114 (2008) ("THE DANGER OF WORKING AT HEIGHTS WITHOUT FALL-PROTECTION EQUIPMENT")?

Plaintiff-Appellee contends that the answer should be "Yes".

The Court of Appeals answered "Yes".

STATEMENT OF FACTS

Pursuant to its Order of October 3, 2014, this Court has directed the parties to file supplemental briefs "addressing whether a significant number of workers were exposed to the high degree of risk identified by this Court in *Latham v Barton Malow Co*, 480 Mich 105, 114; 746 NW2d 868 (2008) ("the danger of *working at heights without fall-protection equipment*"). (Order, October 3, 2014) (Appendix A) (italics in the original). Accordingly, this Statement of Facts will be limited to (1) an explication of the hazard faced by workers on the jobsite in question working at heights without fall-protection equipment and (2) the numbers of workers exposed to those hazards.

The Hazard

On the jobsite in question, as testified to by Ted Crossley, a superintendent for Barton Malow, three mezzanines had been constructed, each between 13-15 feet in vertical elevation from the floor below. (Tr II, 52).[1] There were 12-foot gaps left open on the mezzanines so that the workers would have access for their tools and materials. (Tr II, 73). Mr. Crossley testified that Barton Malow was responsible for fall protection on all of the mezzanines. (Tr II, 74). That fall protection consisted of a single safety cable spanning each gap.[2] (Tr II, 75). The cable had to be lowered when materials were transferred to the mezzanine and, indeed, when the workers

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[1]Transcript citation form will follow that used in Plaintiff-Appellee's Answer to Defendant-Appellant Barton Malow Company's Application for Leave to Appeal ("Plaintiff's Answer").

[2]While not wholly germane to the question posed by this Court in its October 3, 2014 Order, it should be noted that Barton Malow's expert witness, Steven Williams, testified that the single cable constituted a violation of MIOSHA standards. (Williams, 5/7/12, 61).

accessed the mezzanine. (Tr II, 76-77, 105). Mr. Crossley acknowledged that there was a hazard and risk at those times:

> Q And you would also agree with me that when that cable came down, when that cable was lowered, that's when the hazard of working at heights without fall protection was created?
>
> A Yes.
>
> * * * *
>
> Q When cable lowered, hazard created, you agree with that, correct? Correct?
>
> A Yes.

(Tr II, 77) (emphasis added).

Gary Jordan, the safety coordinator for Barton Malow, agreed that "if there were workers on the mezzanine level, one perimeter cable is not sufficient". (Jordan, 5/1/12, 43). Barton Malow's expert witness, Steven Williams, testified that falling from a height of 13-15 feet onto cement posed a severe risk of injury. (Williams, 5/7/12). In light thereof, Mr. Jordan testified that Barton Malow had mandated certain procedures in that event in its safety and loss control program for the job, as set forth in section 810.[3] (Jordan, 5/3/12, 8). As specifically relevant to this question, the section provides:

> The use of safety belts, harnesses and lanyards securely attached to an approved anchor point when working from unprotected high places is mandatory.

(Jordan, 5/3/12, 10-11).[4] Mr. Jordan testified that he suggested to Mr. Crossley that a double

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[3]Mr. Jordan testified that he was never provided with section 810, although he was the safety coordinator and despite the fact that the general safety rules promulgated by Barton Malow required that"[a]ll of our safety rules must be obeyed". (Jordan, 5/3/12, 9, 10).

[4]As to MR. LATHAM and his partner specifically, Mr. Jordan agreed that they should

lanyard system be utilized. (Jordan, 5/3/12, 42-43). However, in the words of Mr. Jordan, "[y]ou got to be tied to something, yes". (Jordan, 5/3/2012, 24). In this case, as testified to by Mr. Crossley, there were never any anchor points installed on the mezzanine. (Tr II, 105,121). Indeed, there were never any anchor points on the job site. (Tr II, 9).

Significant Number of Workers

Once again, it is chiefly the testimony of Barton Malow employees that establishes that a significant number of workers were exposed to the risk of working at heights (on the mezzanines) without fall protection equipment. Representative of that evidence is the following colloquy from the testimony of Mr. Crossley:

> Q And how would these mezzanines be constructed?
>
> A Most of them have a concrete deck. Depending on what's going on up there, the 100 [the site of MR. LATHAM's fall] had an air handler on it. Usually, the one above the kitchens was just food storage.
>
> Q Okay.
>
> A And I don't remember the other one, if there was.
>
> Q Okay. And how many workers would go up originally? What would be the first thing they would do?
>
> A First ones would be the ironworkers [who] would actually set up all the beams and flooring and decking, and then the concrete people would go up there and pour a floor. And then they would

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have had adequate fall protection when leaving the lift. (Jordan, 5/3/12, 24). Barton Malow's expert witness, Steven Williams, corroborates Mr. Jordan's testimony. He testified that if there is risk exposure (as was the situation in this case), men exiting a platform onto an unprotected mezzanine without guardrails needed fall protection. (Williams, 5/7/12, 61). Mr. Crossley acknowledged that had MR. LATHAM been equipped with functional fall protection--fall protection that could actually be utilized--that MR. LATHAM would not have suffered the type of injuries that he actually suffered. (Tr II, 158).

start building the walls, metal walls.

Q And then the drywallers would come in?

A And then the drywall, and they they'd put the equipment up there, and they'd go up and paint and all.

Q And the electricians would have to come in?

A The electricians would be before the walls went up. They'd put in the conduit.

Q They'd put in the rough.

A Yes.

Q Rough electrical. And the plumbers would come in also before, and they'd put in the rough plumbing?

A Sometimes, not necessarily. Most of the times, it was exposed in those areas because they weren't meant for people to go up there other than maintenance people.

Q Okay, and we'll get to that. And then the HVAC people would also be going up there?

A Yes, sir.

(Tr II, 52-53).

Later in his testimony, Mr. Crossley again enumerated the trades exposed to the hazard:

Q So we know that there were electricians up on that mezzanine?

A Oh, yeah, they were up there.

* * * *

Q Correct? There would be plumbers up on the mezzanines, we've established that?

A At some point in time, yes.

Q There would be HVAC people on the mezzanines?

A Yes.

* * * *

A At some point in time, yes.

Q Mechanical people?

A Yes.

Q Painters?

A Yes.

(Tr II, 153-155).[5]

Specifically as to the companies involved, B & H was ordered to complete work on mezzanine 500, east wall, on December 13, 2001. Moote Electric was ordered to work on Mezzanine 300 sometime in January, 2002. (Tr II, 59-61). Giannola Masonry cleaned the mezzanines on January 17, 2002. (Tr II, 62). On that same day, inspection of Mezzanine 100 was required. (Tr II, 63-64). Ideal Contracting was on Mezzanine 500 on January 24, 2002. (Tr II, 57). All of those trades worked on the mezzanines without fall protection equipment.

[5]Interspersed in this colloquy were a series of objections that the trial court overruled. Those objections are not reproduced.

STANDARD OF REVIEW

The inquiry posed by this Court appears to arise out of Barton Malow's contention that the trial court committed reversible error by denying its motions for directed verdict and for judgment notwithstanding the verdict. A denial of either motion is reviewed *de novo*. *Forge v Smith,* 458 Mich 198, 204; 580 NW2d 876 (1998); *Coates v Bastian Brothers, Inc,* 276 Mich App 498, 502; 741 NW2d 539 (2007); *Smith v Jones,* 246 Mich App 270, 273-274; 632 NW2d 509 (2001). Significantly, in both circumstances, the evidence is reviewed in the light most favorable to the non-moving party, including reasonable inferences to be drawn therefrom. *Wilkinson v Lee,* 463 Mich 388, 391; 617 NW2d 305 (2000); *Orzel v Scott Drug Co,* 449 Mich 550, 557; 537 NW2d 208 (1995); *Unibar Maintenance Services, Inc v Saigh,* 283 Mich App 609, 618; 769 NW2d 911 (2009). A motion for directed verdict or for a judgment notwithstanding the verdict should be granted only if the evidence viewed in this manner fails to establish a claim as a matter of law. *Sniecinski v Blue Cross and Blue Shield of Michigan,* 469 Mich 124, 131; 666 NW2d 186 (2003).

ARGUMENT

I. A SIGNIFICANT NUMBER OF WORKERS WERE EXPOSED TO THE HIGH DEGREE OF RISK IDENTIFIED BY THIS COURT IN *LATHAM v BARTON MALOW CO*, 480 MICH 105, 114 (2008) ("THE DANGER OF *WORKING AT HEIGHTS WITHOUT FALL-PROTECTION EQUIPMENT*).

The evidence set forth in the foregoing Statement of Facts demonstrates that a significant number of workers were exposed to the high degree of risk identified by this Court in *Latham v Barton Malow Co, supra*--the danger of working at heights without fall-protection equipment. In two separate colloquies, Ted Crossley, the on-site superintendent for Barton Malow, enumerated the personnel and trades who worked on the mezzanines without fall-protection equipment.

In the first colloquy, see text, *supra*, at 3-4, Mr. Crossley testified that (1) ironworkers, (2) concrete people, (3) drywallers, (4) painters, (5) electricians, (6) plumbers and (7) HVAC people all worked on the mezzanines. In the second colloquy, see text, *supra* at 4-5, Mr. Crossley confirmed that (1) electricians, (2) plumbers, (3) HVAC people, (4) mechanical people and (5) painters worked on the mezzanine.

It will be noted that Mr. Crossley referred to those tradespersons in the plural. At a minimum then, just from the testimony of Mr. Crossley from Barton Malow, 10-14 persons worked on the mezzanines without fall protection.[6] That number is well more than sufficient to

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[6]As set forth in the Standard of Review section of this brief, given that the jury returned a verdict in favor of MR. LATHAM (although finding him comparatively negligent at a rate of 22.5%), the evidence should be viewed in the light most favorable to him. The enumeration in the accompanying text is actually in the light most favorable to Barton Malow as it sets forth the minimum number of tradespersons who worked on the mezzanines. Certainly, a reasonable inference from that testimony is that the usage of the plural meant that more than two individuals per trade worked on the mezzanines. In this case, however, it does not matter whether the jury

meet the "significant number of workers exposed to the risk" element of the common work area liability doctrine enunciated by this Court in *Funk v General Motors Corporation*, 392 Mich 91; 220 NW2d 641 (1974) and unanimously reiterated by this Court in functionally identical terms in *Ghaffari v Turner Construction Company,* 473 Mich 16; 699 NW2d 687 (2005),

RELIEF REQUESTED

Plaintiff-Appellee, DOUGLAS LATHAM, requests that this Court DENY Defendant-Appellant's Application for Leave to Appeal.

Dated: November 18, 2014

Respectfully submitted

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did or did not draw the inference as the jury's determination thereof does not affect the outcome of this case or the response to this Court's particular inquiry.